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# Lawyering for Uncle Sam When He Draws His Sword

William George Eckhardt \*

For 228 years, uniformed lawyers have been providing legal advice to commanders. They have used their legal skill, their sense of social organization, and their understanding of military history and tradition to assist in the formulation of sound discipline, governance, and policy. The unique contribution martial law has made to our country's dedication to the rule of law is a heritage worth celebrating. The purpose of this essay is to discuss this heritage so that one may appreciate the current state of the practice of military law.<sup>1</sup> It includes an exploration of the theoretical conflict between law and armed force; an explanation of how the Defense Department is organized to render legal advice; a history of American military law's contributions to domestic and international law; and a reflection on how this heritage should be taught in the classroom.<sup>2</sup>

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<sup>1</sup> This essay is based largely on my own experience as Chief Prosecutor of the My Lai cases; Legal Advisor for the European Command; a teacher of military law to non-lawyers at the University of California at Berkeley and at the United States Army War College; and a frequent lecturer on Professional Conduct on the Battlefield, with the avowed purpose of preventing another My Lai. All teachers learn from their students and some of my most important insights were learned from my combat arms students. The opportunity to articulate the lessons learned from practice, study, and reflection during a thirty-year military career is a privilege.

<sup>2</sup> Most legal articles are centered on in-depth analysis of a precise issue. My assignment for this essay is quite different. I have been asked to reflect on thirty years of practice and teaching with the purpose of educating, highlighting, and sharing broad ideas, observations, and themes. Documenting such an essay is difficult. Since this is really an “executive summary” of thirty years of speaking and writing, the best documentation comes from past—more expansive—discussions. Three principal sources are available. The first article was written while I was a student at the Army War College and was my first written attempt to deal with the unresolved legal standard for command criminal responsibility. William G. Eckhardt,

## I. LAW AND ARMED FORCE

When the subject of the law of war arises during a general conversation, one often hears comments such as “Law of War—How oxymoronic!” What follows is usually a statement that suggests war is without law, rules, or restraint. Often these comments come from those well versed in criminal procedure and civil liberties, who yet fail to consider that lessons learned involving use of force by the police are applicable to the military as well. Such remarks suggest an absence of reflection about the common ground between law and armed force. What follows is intended to give some perspective on the role of law in armed conflict.

The relationship between law and armed force can best be seen by an examination of the differences and similarities these vital institutions each play in any ordered society.<sup>3</sup> An examination of each in its extreme brings these similarities and differences into sharp focus.

The differences at first seem stark. Law and armed force compete for authority. The law glorifies systems (means) while armed force prizes results (ends). Armed force would do away with an allegedly inefficient, corrupt, unresponsive system and replace it with effective, cleansing force. Law, on the other hand, seeks to avoid the apparently inevitable violent consequences of the results approach: the loss of property, freedom, and life. Furthermore, law and armed force may each seem to have limited tolerance and respect for the institutions and doctrine of the other. Armed force fears that measures necessary

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*Command Criminal Responsibility: A Plea for a Workable Standard*, 97 Milit L Rev 1 (1982). Some years later, this article became a “workhorse” in my teaching and was read and discussed by hundreds of senior officers. After retirement and after becoming a law professor, I was asked to deliver a lecture on the lessons of Nuremberg during the fifty-year anniversary. To provide both a legal history lesson and an update, I relied on Justice Jackson’s remark: “We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow.” William George Eckhardt, *Nuremberg—Fifty Years: Accountability and Responsibility*, 65 UMKC L Rev 1 (1996). Some years later, our law review featured an issue devoted to famous trials. I took the opportunity to say what needed to be said about My Lai in an historical context. William George Eckhardt, *My Lai: An American Tragedy*, 68 UMKC L Rev 671 (2000).

In addition to writing, I have spoken five or six hundred times on professional conduct on the battlefield. Half of those speeches have been devoted to preventing another My Lai. Such a record of public dialogue for uniformed lawyers and teachers is not unusual. It parallels yet differs from a pure academic path which produces written material periodically based on the interest of the author. Military attorneys usually write when time is available (at educational stops) or when an issue rises to unusual importance—often the subject of a conference.

<sup>3</sup> William C. Westmoreland and George S. Prugh, *Judges in Command: Judicialized Uniform Code of Military Justice in Combat*, 3 Harv J L & Pub Poly 1, 1–2 (1980); Eckhardt, 97 Milit L Rev at 29–30 (cited in note 2).

for military success will be outlawed. Law fears the loss of jurisdiction—the loss of control.

Other contrasts seem equally stark. Law restricts power, including its own, while armed force uses power as a tool. Law focuses on means (due process), while armed force demands mission accomplishment. Law seeks to eliminate violence; armed force employs violence. Law seeks to minimize disruption and instability while armed force inevitably creates and even relies on disruption and instability in an attempt to impose a sovereign's will.

Yet both functions are similar. Both deal with matters vital to the state. Law seeks to civilize and organize people, while armed force provides protection when the system breaks down. Thus, both aim to achieve the hallmarks of an ordered society: stability, safety, and security. Law and armed force each seek the preservation of the state, although by very different methods and means. Could any worthwhile society exist in the absence of either function? Can one imagine any civilized society in which there would not be tensions between these two functions?<sup>4</sup>

## II. LAWYERS WITHIN THE DEPARTMENT OF DEFENSE

The Department of Defense uses three titles for lawyers: general counsel, staff judge advocates, and legal advisors. These titles are important because with each goes a distinct function. First, general counsel are mostly civilians who work for the various Secretaries (Defense, Army, Navy, Air Force) or who work in specialized areas (typically not related directly to warfighting). General counsel perform political tasks of policy formulation, coordination, and implementation that would be inappropriate for uniformed lawyers. Second, staff judge advocates are the traditional military lawyers who practice administrative law, criminal law, legal assistance, claims, and procurement. Staff judge advocates also deal with international law and are responsible for law of war teaching and training. The staff judge advocates are justifiably proud of their operational law expertise and their practice of the law of war when training with or deployed with their units.

Third, and markedly different from their counterparts, are the legal advisors to the Unified Combatant Commanders who perform legal services within the joint chain of command. The Goldwater-Nichols Act of 1986<sup>5</sup>

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<sup>4</sup> Law and armed force are not mutually exclusive; it is incorrect to think of these concepts in terms of exclusive opposites: war *or* peace; law *or* armed force. Only when one realizes the reality of both being present can the creative tension between these two competitors for power focus attention on workable solutions.

<sup>5</sup> Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub L No 99-433, 100 Stat 992 (1986), codified in scattered sections of 5, 10, 22, 31, 38, 42, 46, and 50 USC (2000).

dramatically increased the authority and the responsibility of these legal advisors.<sup>6</sup>

The legal advisors work for joint legal offices that are small, specialized, and unusually credentialed. These positions are usually held by ten or fewer lawyers who have practical experience in operational law and the law of war and who have graduate degrees in international law. These joint legal officers concentrate on the legal aspects of warfighting. Their field includes operational law, international agreement management, status and stationing agreements, host nation support, and internal command issues. Joint legal offices do *not* do base legal work, such as criminal justice, legal assistance, claims, etc.

The legal advisor's law office management is also unique. As international agreement managers, they are often responsible for keeping track of hundreds of international agreements. As such, their law libraries are a rare combination of domestic law and often exotic international law. Operational law practice changes so rapidly that librarians often must carefully collect legal conference materials and keep track of contact information for persons responsible for sensitive areas. Conference materials must be carefully organized, managed, and used—often on a daily basis. Communication within such an office is complicated: classified information necessitates special precautions and requires means for secure voice and document communication within the unified command, with all of the various military services, and with key offices in certain embassies, as well as with the Departments of Defense, State, and Justice in Washington, DC. An office manager must be unusually flexible, vigilant, and technically sophisticated.

The role of the legal advisor is quite varied. The legal advisor must be an international agreement manager, which is particularly important because Great Powers must be perceived to be consistent and to keep their word. A legal advisor must supervise the handling and reporting of all such agreements and must review them for compliance with both domestic law and international law. In operational matters, a legal advisor must protect the honor of the United States. The legal advisor is a member of the battle staff, reviews war plans, and helps develop strategy by ensuring that the legal underpinnings are understood.<sup>7</sup>

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<sup>6</sup> The ideas for this section were first articulated in an address before the Military Law Committee of the American Bar Association on August 9, 1991, in Atlanta, Georgia.

<sup>7</sup> From 1988–91, I served as the Legal Advisor to the United States European Command. My principle task was “to bring the law into the battle staff” in a Unified Command invigorated by the Goldwater-Nichols Act. Assisting me were Colonel Richard J. Erickson, Captain Thomas E. Randall, Colonel Keith Sefton, Colonel Werner Hellmer, and Lieutenant Colonel Richard A.B. Price, who used their intellectual talents and creative energy to successfully bridge the high standards demanded by both the legal profession and the profession of arms. During this period, collectively, we became full participants in the battle staff: we reviewed war plans and significantly upgraded their practical legal content, and we assisted in the articulation and implementation of strategy.

As various parts of the government interact, the legal advisor helps insure that the United States speaks with one voice in national security matters. A legal advisor is an advocate—nationally and internationally—for practical, enforceable, and understandable rules involving the use of force. Behaving much as a law professor would, the legal advisor attends conferences, attends lectures, and writes on the vital link between the law of armed conflict and the profession of arms. Uniquely, the legal advisor is a legal policymaker within his command's area of operations. This function often includes participation in international negotiations and in strategic policy formulation. The legal advisor becomes an actor and not a mere advisor. The legal advisor is thus quite different from a general counsel or a staff judge advocate.

### III. AMERICA'S UNIQUE MILITARY LAW CONTRIBUTIONS: A BRIEF HISTORY

The work of today's uniformed lawyers rests on three major contributions to the American legal system made by their predecessors: the Uniform Code of Military Justice and its descendants, which clearly incorporated American military law into the same general constitutional framework as civilian law; the Legal Assistance Program for service personnel; and, most important, the Lieber Code (General Order 100),<sup>8</sup> which laid the foundation of modern law of war.

Discipline is the essential ingredient in any professional armed force. The Uniform Code of Military Justice<sup>9</sup> ("UCMJ") balanced the requirements of good order and discipline with the American concept of justice, which is grounded on a civil-liberty-oriented rule of law.<sup>10</sup> The UCMJ was amended by the Military

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<sup>8</sup> General Orders No 100, US War Dept (Apr 24, 1863). Selection of these three contributions is my own. During the bicentennial of our country, while stationed at the Presidio of San Francisco, my office facilitated the placement of a brass plaque commemorating the founding of The Judge Advocate General's Corps. My conceptions of these three contributions originated during that period.

<sup>9</sup> Pub L No 81-506, 64 Stat 108 (1950), codified at 10 USC § 801 et seq (2000).

<sup>10</sup> William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 Am Crim L Rev 5 (1971). In this article, Gen. Westmoreland, then Chief of Staff of the Army, articulated the basic framework for any military code of justice. His main points include:

1. The system must deter conduct that is prejudicial to good order and discipline.
2. Military law must both motivate soldiers and prevent offenses.
3. Military law must aid in preserving the authority of military commanders.
4. The military justice system must protect discipline, loyalty, and morale.
5. Protection must be provided against conduct that threatens the integrity of the military organization and the accomplishment of the mission.
6. The military justice system must provide for rehabilitation.
7. The system must operate with reasonable promptness.
8. The system must be flexible.
9. The system must protect against offenses to persons and to property.

Justice Act of 1983.<sup>11</sup> This Act allows service personnel to file habeas corpus petitions in the United States Supreme Court in court-martial cases, creating a leap from an Article I court (court martial) to an Article III court (the Supreme Court). Everyone joining the armed forces and submitting to military discipline can rest assured that the Supreme Court will be the ultimate arbiter of legal disputes in the administration of good order and discipline.

The most recent major contribution of the US military to the American legal system is legal assistance, which delivers legal services to those less privileged. Some eight million servicemembers in World War II rapidly mobilized from civilian life and needed help resolving the resulting legal problems of a hasty departure from home and school or jobs. Using its military attorneys, the United States for the first time established a system of legal assistance. In time others—labor unions, corporations, and government officials charged with helping the poor—followed this example. Great need often brings innovative, practical, and durable solutions.

The Lieber Code, which set America on the path to developing a law of war, also rose out of necessity. The blood-soaked battlefields, chaos, and suffering of our Civil War prompted action. President Lincoln assigned General H.W. Hallack and law professor Francis Lieber the responsibility of producing much-needed military regulations. Francis Lieber taught law at Columbia and at the University of South Carolina. As a young man, he had both fought in and observed the Napoleonic Wars. He was badly wounded and left to die on the battlefield in the Battle of Namur. Lieber's discipline, experience, and legal skills were essential to his leadership role in the formation of the law of war in the United States.

Using his pen, Lieber did what Americans seem to do so well. Clearly understanding the humanitarian concerns which were necessary to avoid unnecessary suffering and loss of life and property and obviously possessing the legal skills to articulate clear, understandable, practical rules, Lieber produced General Order 100.<sup>12</sup> These regulations were so "revolutionary"—a carefully

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10. The system must provide a commander with the authority and means to maintain good order and discipline.

11. There should be no conflict between discipline and justice: the military justice system should be an instrument of justice and in the process it will promote discipline.

12. Our system of military justice should protect the rights of individuals.

<sup>11</sup> Military Justice Act of 1983, Pub L No 98-209, 97 Stat 1393, codified in scattered sections of 5, 10, and 28 USC (2000). Both the Uniform Code of Military Justice and the Military Justice Act were enacted pursuant to Article I of the US Constitution, clearly centering military discipline within the constitutional framework that governs and protects all Americans. See US Const art I, § 8, cl 14 ("The Congress shall have Power . . . to make Rules for the Government and Regulation of the land and naval Forces.").

<sup>12</sup> Consider James G. Garner, *General Order 100 Revisited*, 27 Milit L Rev 1 (1965). General Orders No 100 (cited in note 8).

chosen and appropriate word—that within only twenty years they led to the rewriting of the law of war manuals of the great European powers. Decades later these same regulations became the basis of The Hague and the Geneva Conventions and a significant contributing foundation to modern law of war.

Individual leadership as well as unique ideas and a carefully crafted system ensures progress. Certainly this is true for the development of military law in the United States. Elihu Root—the turn of the twentieth century Secretary of War, Secretary of State, Senator, President of the American Bar Association, and winner of the Nobel Peace Prize—may well be the “Father of American National Security.” This lawyer who, in his own words, “knew nothing about war,” was an extraordinary leader. His vision, political skills, and practical concepts of the rule of law produced building blocks without which history might have been very different.<sup>13</sup>

Root was instrumental in the passage of the Dick Act of 1908, which made fungible America’s two armies—the federal Regular Army and the state National Guard or Militia.<sup>14</sup> He envisioned that both armies should have similar standards, training, uniforms, and equipment. In short, in times of crisis, these two armies with different commanders (the President and state governors) could become a whole. Winning World War I, World War II, and especially the long Cold War would have been impossible without this fungibility.

Root also reformed the War Department, modernizing it and making it more efficient. He ended the antiquated, inefficient bureau system that had been used to manage the Western frontier and replaced it with a democratic, legally regulated organization similar to the German General Staff. So encompassing was this reform that his organization carried us through the change and complexity of World War II. Lastly, he founded the Army War College (under the motto “Not to Promote War but to Preserve Peace”) and the system of senior military education. Root believed that war was sinful and evil but could not be outlawed. As it could not be abolished, he concluded that war should be carefully studied in an attempt to avoid it. But if war were necessary, the least number of lives and the least amount of treasure should be expended. Rarely has one man made such major, long-lasting contributions. Elihu Root exemplifies the contributions that law and lawyers can provide to national security.

System also has its place. Our national security system was largely built after World War II. At the beginning of that conflict, the United States Army was only the eighteenth largest in the world—and, because of a lack of equipment, its troops were conducting drills carrying broomsticks instead of guns. But the country emerged only five years later as the mightiest nation in the

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<sup>13</sup> See, generally, Richard W. Leopold, *Elihu Root and The Conservative Tradition* (Little, Brown 1954).

<sup>14</sup> Second Militia (Dick) Act, Pub L No 145, 35 Stat 399 (1908).

world, and its hastily created emergency force needed to evolve into a permanent fixture. A series of congressional acts followed, all of which produced profound change.

The lead act was the National Security Act of 1947.<sup>15</sup> This Act provided our permanent peacetime defense establishment, creating the Department of Defense with its Joint Staff System. The Act also established the Central Intelligence Agency, the National Security Council, and an independent Air Force. The importance, breadth, and scope of this Act takes one's breath away.

Reform usually is needed in twenty-year intervals. The next overhaul involved the intelligence arm of the military, addressed by the Church Commission in the 1970s.<sup>16</sup> Secret "black-book" operations are particularly important for strategic reasons, and yet difficult to rationalize in a democracy, which demands oversight and accountability. The Church Commission created parliament-like congressional oversight. With carefully established layers of responsibility requiring an authorizing official to sign a finding for secret operations, the system permitted flexibility, but only with ultimate political accountability.

Military reform came ten years later with the Goldwater-Nichols Act of 1986.<sup>17</sup> Prior to this Act, an intolerable strain on military governance existed. Hoteling functions constantly competed with the warfighting functions. Hoteling functions include procuring, recruiting, training, equipping, disciplining, and governing. Warfighting functions include deliberative war planning and ad hoc crisis action management. Unfortunately the daily demands of hoteling tasks necessarily took precedence over the more deliberative, time consuming, and usually less immediately pressing warfighting functions. The Goldwater-Nichols Act separated these functions by establishing two different chains of command—the Service Secretaries performed the hoteling functions while the Unified Commands and the Joint Staff were primarily responsible for warfighting. Thus, the positive aspects of both functions were accentuated and strengthened. In addition, the separation shortened, invigorated, and made more responsive both chains of command. It requires each administration to produce a national security strategy to insure public education and debate. Especially important, the separation helped the United States speak with one voice on security matters overseas.

Three congressional acts addressing legal issues unique to the military have been passed since World War II and undergird in important ways other national

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<sup>15</sup> National Security Act of 1947, Pub L No 80-253, 61 Stat 495 (1947), codified in scattered sections of 10 and 50 USC (2000).

<sup>16</sup> Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, S Rep No 755, 94th Cong, 2d Sess (1976).

<sup>17</sup> Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub L No 99-433, 100 Stat 992, codified at 10 USC 111 (2000).

security acts of greater scope. The 1950 Uniform Code of Military Justice<sup>18</sup> civilianized, reformed, and made uniform the basic criminal code for the armed forces. In attempting to meet criticism of military justice engendered during the mass mobilization of World War II, the revised code clearly tilted toward a civilian model, ignoring important elements of its unique martial character, particularly in the Law of War. But it updated practices that had been unchanged since reforms following World War I, and it made uniform the military law applied to the old Army and Navy and the new Air Force. Then, with the Military Justice Act of 1968,<sup>19</sup> a major “lawyerization”—an infusion of lawyers into the process—occurred. But more recently, revolutionary changes—usually prompted by a major conflict—have given way to yearly corrections; this process ensures healthy, steady, and predictable modernization.

With the Military Justice Act of 1983,<sup>20</sup> Congress added an essential final reform. To ensure uniformity between Article I courts martial and Article III federal courts and to achieve Supreme Court Article III oversight, Congress allowed service personnel to petition the Supreme Court via writ of habeas corpus in court martial cases. The military justice system is now directly subject to constitutional supervision by the Supreme Court. Most recently, in the War Crimes Act of 1996,<sup>21</sup> previously imperfectly implemented Nuremberg principles for war crimes were at least partially corrected when those who were not subject to trial by courts-martial could be tried in federal district court for war crimes. The prior jurisdictional defect had prevented 90 percent of those subject to prosecution in the My Lai incident from facing possible charges.<sup>22</sup>

Tragedies, even those that stain an institution, can be the impetus for great change. Such was certainly the case for the Vietnam-era My Lai tragedy, in which a company of soldiers lost their discipline, got out of control, and murdered over five hundred Vietnamese civilians. National character can be judged by how countries react to such tragedies. The reaction of the United States is well summarized by an introduction I received before a presentation at the International Society for Military Law and the Law of War in Brussels, Belgium, in 1991. After referring to My Lai, my Belgian host introduced me with the following words: “Only the United States of America would not cover it up, would prosecute it at the cost of losing a war, and would use it so forcefully to prevent future incidents.” For over thirty years, the cry “No More My Lais” has

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<sup>18</sup> See Pub L No 81-506, 64 Stat 107 (1950).

<sup>19</sup> Pub L No 90-632 § 866, 82 Stat 1335, 1341 (1968), codified in scattered sections of 10 USC (2000).

<sup>20</sup> Pub L No 98-209 (1983), 97 Stat 1393, codified as amended in scattered sections of 10 USC (2000).

<sup>21</sup> War Crimes Act of 1996, 18 USC § 2441 (2000).

<sup>22</sup> See Eckhardt, 68 UMKC L Rev at 680–82 (cited in note 2).

been a driving force in the development of professional conduct on the battlefield.

Most importantly, the profession of arms reclaimed the rules of its own profession. The law of war came out of the library and off lawyers' desks and once again became the province of the practical profession of arms. Law of war programs were introduced and integrated into training. The military found ways to talk about such subjects as disobeying illegal orders.<sup>23</sup> A recognized military law specialty, operational law,<sup>24</sup> was born. This increased attention to rules of war, coupled with technology, produced service-wide rules of engagement—the means by which force is controlled.<sup>25</sup>

Most service personnel are not lawyers, however. Our heritage of the rule of law and the guidance of the laws of war must be part of everyday conduct and training. This practical integration of law and armed force is well expressed by emphasis on five basics.<sup>26</sup> First, professional training is key. Individual bests must be combined to produce a unit best. This, of course, is military training. Second, military personnel must know, understand, and enforce compliance with the rules of engagement—when to shoot, at what and whom, and under what

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<sup>23</sup> When confronted with the challenge of teaching difficult negatives, it is often best to teach positives. This is certainly true in teaching professional conduct on the battlefield. The best example of this strategy can be found in The Nine Marine Corps Principles:

1. Marines fight only enemy combatants.
2. Marines do not harm enemy soldiers who surrender. Disarm them and turn them over to your superior.
3. Marines do not kill or torture prisoners.
4. Marines collect and care for the wounded, whether friend or foe.
5. Marines do not attack medical personnel, facilities or equipment.
6. Marines destroy no more than the mission requires.
7. Marines treat all civilians humanely.
8. Marines do not steal. Marines respect private property and possessions.
9. Marines should do their best to prevent violation of the law of war. Report all violations of the law of war to your superior. (Or Judge Advocate, Chaplain or Provost Marshal.)

The Marine Corps Principles were adopted as The Soldier's Rules by the Army in Army Regulation 350-41, Training in Units (Mar 19, 1993) as minimum training and knowledge for all personnel.

<sup>24</sup> The Army developed a concept of "operational law." That term was defined as follows: "Operational Law (OPLAW) incorporates, in a single military legal discipline, substantive aspects of international law, criminal law, administrative law, and procurement-fiscal law relevant to overseas deployment of US military forces. It is a comprehensive, yet structured, approach toward resolving legal issues evolving from deployment activities." Capt. Jeanne M. Meyer and Cdr. Brian J. Bill, eds, *Operational Law Handbook* (Center for Military Law and Operations and International Law Division, The Judge Advocate General's School, United States Army 2002), Preface to Original OPLAW Handbook (1992). See Marc L. Warren, *Operational Law—A Concept Matures*, 152 Milit L Rev 33 (1996).

<sup>25</sup> Consider Eckhardt, 68 UMKC L Rev at 695–98 (cited in note 2).

<sup>26</sup> Id at 694–95.

circumstances. Third, because clear thinking is difficult when shots are being fired, personnel must comply with standard operating procedures. Yes, drilling is important. Fourth, subordinates must be controlled by clear and concise orders. Commissioned officers and non-commissioned officers must intervene at the first sign of lack of discipline. Fifth, and most importantly, the military must always travel the truthful moral high road. In short, a decision to pull the trigger is ultimately an individual professional decision involving legality, morality, and common sense. Our civilian education, our military education, and our religious education attempt to prepare us for such moments. When the law of war is thus practically integrated, professional conduct on the battlefield results. When service personnel follow these principles, they are fighting lawfully.

The political aftermath of the My Lai incident and the increasing use of the law of war as a weapon against the United States by our enemies have produced a new method of communicating and a healthy democratic public accountability.<sup>27</sup> Although the United States is not likely to lose militarily on the battlefield, the United States is far more vulnerable in the world court of public opinion. Knowing that our society so respects the rule of law that it demands compliance with it, our enemies carefully attack our military plans as illegal and immoral and our execution of those plans as contrary to the law of war. Our vulnerability here is what philosopher of war Carl von Clausewitz would term our “center of gravity.” To counter these attacks our government—and the military in particular—have developed a mechanism to justify, explain, and account for its actions. This change began with a presidential address by President Ronald Reagan when he directed the bombing of Libya in 1983,<sup>28</sup> comparable to carefully created governmental policy statements in Britain known as “White Papers.” The government subsequently has had the discipline to articulate the legal and moral justification for our military actions. For the military, this means that the warfighters (commanders and operations officers) must fight the war by day and explain their actions on CNN at night. The Secretary of Defense and the Chairman of the Joint Chief of Staff have become as much public spokesmen as war managers.

In a democracy, however, nothing could be healthier. Our citizens need to know the costs—in lives and in dollars—of any military action. In our society, nothing is more ethically sensitive than the use of deadly force. The same is true with our domestic police. When our military personnel “kill people and break things in the name of the state,”<sup>29</sup> we demand that this use of force be done in

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<sup>27</sup> Id at 698–99.

<sup>28</sup> President’s Address to the Nation, United States Air Strike Against Libya, 22 Weekly Comp Pres Doc 491–92 (Apr 21, 1986).

<sup>29</sup> I frequently use this phrase to describe the function of the armed forces. It is brutal, graphic, and accurate. Many try to soften the reality of war by choosing milder words—for example, “humanitarian law” instead of “law of war.” This phrase focuses attention on reality.

accordance with the rule of law. Sound military policy can only be formulated with a dialogue between the military, the government, and the citizenry. The justification we see nightly on the evening news often has legal and moral overtones, and, thus, the concepts of just war and the law of war form the basis for this dialogue. In reality, modern warfare has added a new requirement. Not only must the military train, plan, and execute a military operation; the military must now justify its operations as well.

#### IV. TEACHING: LESSONS THAT NEED TO BE TAUGHT

One trains for certainty but educates for uncertainty. It is the uncertainty that many of us have spent our lives addressing. The three case studies and addendum that follow can teach officers valuable lessons.

The lesson of My Lai is that ill-discipline on the battlefield loses wars.<sup>30</sup> Discipline and the basics of the profession of arms are underscored in the study of My Lai, and the issue of command criminal responsibility arises.<sup>31</sup> Students are reminded that the function of the profession of arms is so basic and so important to society that military personnel can be punished for *inaction*. When military personnel reasonably know of improper activity and do nothing, they are subject to criminal prosecution. In contrast, other professions are usually punished only when they criminally or negligently improperly *act* in the performance of their professional duties.

The necessity of continually modifying the rules of engagement to correspond with current political reality is the lesson learned from the bombing of the Marine headquarters in Lebanon and the Long Commission Report.<sup>32</sup> In this instance, the Marines were sent to Lebanon as peacekeepers. When the political conditions changed, the rules of engagement were not altered—with tragic consequences. Rules of engagement are both a process and a product. The product is the result of a continuous process of evaluating political conditions, the military mission, and current rules regarding the use of force. The process is the first and constant task of those involved in “managing” the use of force. The official discussion in the Long Commission Report regarding the court-martialing of the four-star NATO commander for failure to properly supervise the rules of engagement has been an example for unified commanders, their staffs, and their legal advisors of what *not* to do. The first words spoken to me when I first became a legal adviser by my four-star combatant commander were:

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<sup>30</sup> See Eckhardt, 68 UMKC L Rev at 694–95 (cited in note 2).

<sup>31</sup> See Westmoreland and Prugh, 3 Harv J L & Pub Poly at 3–21 (cited in note 3).

<sup>32</sup> United States Department of Defense Commission, *Report of the DoD Commission on Beirut International Airport Terrorist Act, October 23, 1983* at 44–51 (Dec 20, 1983) (known as “The Long Commission Report”).

“Colonel, are you familiar with the Long Commission Report?” With that question, he forcefully reminded me of my heavy new responsibilities.

The Iran-Contra incident provides a third important case study. Both the Tower Commission Report<sup>33</sup> and the Joint Congressional Commission Report<sup>34</sup> underscore the dynamics that can develop between the executive branch and the legislative branch of the United States government when important national security issues are at stake. Of particular significance is the theory articulated in the Tower Commission Report concerning the proper method for formulating national security policy at the National Security Council level. This incident also provides a practical vehicle for a discussion of the appropriate role for military officers in such situations.

One teaching addendum is necessary for a matter that transcends specific lessons learned from case studies. Indeed, it permeates—in important ways—the entire practice of martial military law. The profession of arms has two historic “carriers”—the law of war and just war tradition. Some argue that the modern law of war replaces and trumps the just war doctrine,<sup>35</sup> which should be avoided because it adds religious gasoline to sensitive secular discussions. Nothing could be further from the truth. It is true that the *jus in bello* (just conduct of war) has been supplanted by the law of war and rules of engagement but its basic concepts of discrimination, noncombatant immunity, and proportionality are the intellectual building blocks of professionalism and morality in the conduct of warfare. The criteria of *jus ad bellum* (just recourse to war) are quite helpful in the public debate about going to war. One must use the language of just war in justifying military use of force. Likewise, senior military leaders must understand these principles when they speak about and—more importantly—when they formulate military policy.

Similarly, just war theory is alive and well in the United States. During the nuclear buildup of the 1980s, American churches became concerned that man might commit the ultimate sin: the destruction of God’s creation. Each church group in its own way—using its unique theology and polity—struggled with issues of war and peace. Each dealt in theological terms with the role of

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<sup>33</sup> John Tower, Edmund S. Muskie, and Brent Scowcroft, *Report of the President's Special Review Board* (Feb 1987) (known as “The Tower Commission Report”).

<sup>34</sup> Lee H. Hamilton and Daniel K. Inouye, *Report of the Congressional Committees Investigating the Iran-Contra Affair* (Nov 13, 1987) (known as “The Joint Congressional Committee Report”).

<sup>35</sup> The articulation of the just war doctrine is not uniform. The articulation I prefer distinguishes two issues, *jus ad bellum*, or just recourse to war, and *jus in bello*, just conduct in war. *Jus ad bellum* requires that the war have just cause, be waged by legitimate authority with just intentions, be publicly declared, cause more good than harm, be used only as a last resort, and have a reasonable hope of success. *Jus in bello* demands discrimination between combatants and noncombatants, with the latter granted immunity, and a proportional amount and type of force applied. This is excerpted from The United Methodist Council of Bishops, *In Defense of Creation: The Nuclear Crisis and a Just Peace* 33–34 (Graded 1986).

government in general, with the issue of peace, with the use of force, and with the use of weapons of mass destruction. These American church letters<sup>36</sup> will be used for years in both our theological and in our secular debates concerning the use of force. As any teacher of the law of war recognizes, the major premises are often theological or philosophical.<sup>37</sup>

## V. CONCLUSION

Lawyering for Uncle Sam when he draws his sword is really not so unique. Lawyers performing such functions provide legal advice. They assist an institutional client with non-legal or semi-legal process. They act as a reminder of the rule of law, a keeper of the conscience of the command, a witness to important events, and an unbiased resource to assist decision makers. Honor and not money is the coin of the realm. Unusually ethical practice and continuous education are professionally rewarding. In sum, such practice provides an opportunity to “perform or influence the performance of great actions; [to] bring new growth and new challenge; and [to] have the capacity to leave a legacy of honor, hard work and respect for the law.”<sup>38</sup>

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<sup>36</sup> See, for example, National Association of Evangelicals, *Guidelines: Peace, Freedom, and Security Studies: A Program for the NAE* (1986); The United Methodist Council of Bishops, *In Defense of Creation* (cited in note 35); The Lutheran Church in America, *Peace and Politics* (Division for Mission in North America 1984); National Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response: A Pastoral Letter on War and Peace* (US Catholic Conference 1983); The United Presbyterian Church in the United States of America, *Peacemaking: The Believer's Calling* (Office of the General Assembly 1980).

<sup>37</sup> During my assignment on the faculty of the Army War College and during my off-duty time, I, along with three other colleagues, taught “Contemporary Theology of War and Peace” to Catholic and Protestant War College students for three years. The Commandant of the College was a student during one of those years. We used these church letters, among others, and included differing versions of liberation theology. This was the most difficult class I ever taught, yet it has helped me immensely in speaking publicly about war and peace and the law of war.

<sup>38</sup> The full quotation has long been a favorite.

War has been said to be an impersonal thing, and in many respects it is. However, armies are necessarily composed of human beings—who perform or influence the performance of great actions; who bring new growth and new challenge; and who have the capacity to leave a legacy of honor, hard work and respect for the law.

United States Army, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775–1975* 1 (GPO 1975).